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In the Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether a charge of unlawful employment discrimination filed by a Commissioner of the Equal Employment Opportunity Commission under Section 706(b) of Title VII of the Civil Rights Act of 1964 is invalid because it sets forth the asserted discriminatory practices in general terms rather than articulating the factual basis for the allegations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 676 F.2d 322, and the decision denying rehearing en banc (Pet. App. 34a-39a) is reported at 689 F.2d 757. The opinion of the district court (Pet. App. 15a-31a) is published at 523 F. Supp. 79.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1982 (Pet. App. 32a-33a). The opinion of the court of appeals was modified and a petition for rehearing was denied on July 20, 1982 (Pet. App. 10a-14a, 34a-39a).

The petition for a writ of certiorari was filed on November 16, 1982, and granted on February 22, 1983 (J.A. 183). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, and the EEOC's Procedural Regulations, 29 C.F.R. 1601.12, are set forth at Pet. 2-3. The Commission's Standards for Selecting Systemic Respondents, E.E.O.C. Compl. Man. (CCH) § 16.2 (1979), and the Procedure for Selecting Systemic Respondents (*id.* at 16.3) are set forth at Pet. App. 40a-43a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, prohibits employment discrimination based on an individual's race, color, religion, sex or national origin. Section 703, 42 U.S.C. 2000e-2. Under the Act, charges of discrimination may be filed by or on behalf of a person aggrieved, or by a member of the Equal Employment Opportunity Commission. Section 706(b), 42 U.S.C. 2000e-5(b).

Section 706(b) provides that all charges "shall be in writing under oath or affirmation, and shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)). The Commission's regulations require a charge of discrimination to contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices" (29 C.F.R. 1601.12(a)(3)), but further provide that, notwithstanding the above, a written charge is sufficient if it identifies the parties and "describe[s] generally the action or practices complained of" (Section 1601.12(b)).

Section 706(b) further provides that, within 10 days of the filing of a charge, the Commission "shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on the respondent. 42 U.S.C. 2000e-5(b).[1] The

[1] Although Section 706(b) expressly leaves the form and content of administrative charges to the informed discretion of the

Commission must then undertake an investigation to determine whether reasonable cause exists to believe that the charge is true. *Ibid.* During the course of this investigation, the Commission is entitled to inspect and copy any evidence of the person or firm being investigated (Section 709(a), 42 U.S.C. 2000e-8(a)), and may issue subpoenas that can be enforced upon application to the district courts. Section 710, 42 U.S.C. 2000e-9 (incorporating Section 11 of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 161). If the Commission finds insufficient evidence to support a finding of reasonable cause, the Commission notifies the charging party of its conclusion and takes no further action. Section 706(b), 42 U.S.C. 2000e-5(b). If, however, the Commission finds that reasonable cause exists, it must endeavor to eliminate any alleged unlawful practices through informal methods of conference, conciliation and persuasion before resorting to a civil enforcement action brought in federal court. Section 706(b) and (f), 42 U.S.C. 2000e-5(b) and (f).[2]

2. Many charges are filed directly by aggrieved complainants. A commissioner's charge may be filed on behalf of an aggrieved person, however, where that individual is unwilling to come forward publicly for fear of

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Commission (42 U.S.C. 2000e-5(b)), some courts, including the court below, have stated that it "is not entirely clear" (Pet. App. 6a n.3) whether the " 'date, place and circumstances' should be in the charge itself * * * or in the notice of the charge." *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1337 n.2 (9th Cir. 1980). The current Commission practice is to provide respondents with a copy of the administrative charge in satisfaction of Section 706(b)'s notice requirements. 29 C.F.R. 1601.14.

[2] Should informal conciliation efforts fail, the Commission is empowered to bring a civil action against any respondent "not a government, governmental agency, or political subdivision" (Section 706(f), 42 U.S.C. 2000e-5(f)). Cases involving governmental agencies or other political subdivisions are "refer[red] * * * to the Attorney General who may bring a civil action against such respondent" (*ibid.*).

economic or physical reprisal. See S. Rep. No. 92-415, 92d Cong., 1st Sess. 26 (1971). Moreover, Section 707 of Title VII grants the Commission "authority to investigate and act on a charge of a pattern or practice of discrimination" (42 U.S.C. 2000e-6(e)).[3] Commissioners' charges, therefore, are filed in two circumstances: to protect the identity of an aggrieved individual, see 29 C.F.R. 1601.7 and 1601.11, and to alleviate instances of systemic discrimination that may not be readily identifiable on the basis of individual complaints alone. See, *e.g.*, *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 38 (4th Cir. 1971).

In order to isolate "situations where the patterns of employment discrimination are the most serious, and where maintenance of a successful 'systemic case' will have a significant positive impact on the employment opportunities available to minorities and women" (E.E.O.C. Compl. Man. (CCH) § 16.1 (1982)), the Commission has developed guidelines for identifying employers that may be engaged in systemic discrimination. E.E.O.C. Compl. Man., Pet. App. 40a-43a. These systemic guidelines contemplate that commissioners' charges may be issued against respondents that meet one or more of the published standards. *Id.* at 40a-44a.[4] These

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[3] "Pattern or practice" charges under Section 707(e), 42 U.S.C. 2000e-6(e), may be filed by a member of the Commission and are processed in accordance with the procedures outlined in Section 706.

[4] Relevant factors under the systemic guidelines include: whether an employer "continues[s] in effect policies and practices which result in low utilization of available minorities and/or women;" whether an employer hires "a substantially smaller proportion of minorities and/or women" in its higher paid than its lower paid job categories; whether an employer maintains recruitment, hiring, assignment, promotion, discharge or other policies not justified by business necessity "that have an adverse impact on minorities and/or women;" whether an employer utilizes restrictive employment practices that "are likely to be used as models for other employers;" and whether an employer provides available minorities and women with fair access to employment if the employer has "substantial numbers of employment opportunities" (Pet. App. 40a-41a).

standards are applied to "an analysis of EEO reporting data and other available information," including individual charge files and data from other administrative agencies. *Id.* at 41a-42a. A potential systemic charge passes through successive stages of staff review before being presented to a commissioner with a memorandum detailing the preliminary data supporting issuance of a charge. *Id.* at 41a-43a. Although a complaint by an aggrieved individual may provide the basis of a systemic charge (see 29 C.F.R. 1601.6), commissioners' charges generally are based upon an analysis of the statistical data contained in annual reports filed by employers with the Commission and the Department of Labor's Office of Federal Contract Compliance Programs.

3. On September 27, 1979, Eleanor Holmes Norton, then Chair of the Commission, issued a sworn commissioner's charge against the respondent, Shell Oil Company, alleging unlawful employment practices at respondent's Wood River Refinery, Wood River, Illinois. The charge was the product of the Commission's systemic charge process, and Commissioner Norton stated that she had cause to believe that respondent "has violated and continues to violate Sections 703 and 707 of the Civil Rights Act of 1964, as amended, by discriminating against Blacks and females on the basis of race and sex with respect to recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment" (Pet. App. 44a). The charge specified that such discrimination resulted from respondent's unlawful exclusion of Blacks from "managerial, professional, technical, office/clerical, craft, and service workers positions" and the company's similar exclusion of women from "managerial, professional, technical, craft, operative, laborer and service worker positions" (*ibid.*). The charge was subsequently amended to state that Commissioner Norton had reason to believe that respondent had engaged in the unlawful practices on a continuing basis from at least

July 2, 1965, to the present (*id.* at 47a). See *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1337-1338 (9th Cir. 1980).

The charge was filed with the EEOC's St. Louis District Office on October 16, 1979 (J.A. 59). The charge, along with a request for information regarding respondent's employment practices, was served on the company 10 days later (*id.* at 60). 42 U.S.C. 2000e-5(b). Although respondent recognized that the charge was based, at least in part, on its annual EEO-1 reports that had been filed with the Commission (J.A. 92, 157),[5] the company refused to comply with the Commission's request for information on the ground that the Commission possessed an insufficient factual basis for "the broad general allegations stated in the charge" (*id.* at 90). Respondent argued that any investigation of its employment practices was improper because its "bottom line statistics reflect that there is no violation of the Civil Rights Act of 1964 as amended on a systemic basis" (*id.* at 93). The company sought to bolster its objection to the merits of the charge by describing its undifferentiated aggregate workforce statistics (*id.* at 90-91) and asserting that its record was "clearly not the profile anticipated for a Commissioner's Charge" (*id.* at 90). The company also suggested that the appropriate labor market for purposes of statistical comparison was not the St. Louis Standard Metropolitan Statistical Area (SMSA), but instead a smaller region of selected counties (*ibid.*).

In response to the company's asserted defenses, the Commission pointed out that respondent's submission of facility totals, rather than information by particular job categories, was insufficient to permit meaningful analysis (J.A. 106). In addition, the Commission stated that the evidence submitted by respondent was insufficient to permit an evaluation of its defense based on non-SMSA labor market availability, a defense the Com-

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[5] EEO-1 reports detail the statistical composition of an employer's workforce by job category, race and sex (see Pet. Reply Br. 4-6).

mission regarded as premature in any event at the investigatory stage (*id.* at 95).

When informal efforts to obtain the requested employment information proved fruitless, the Commission issued a subpoena duces tecum on May 15, 1980, requiring respondent to produce certain employment information covering the years 1976 to the present (J.A. 60, 112-127). In accordance with Commission regulations, respondent petitioned the St. Louis District Director to revoke or modify the subpoena (*id.* at 139-144). After considering each of respondent's 16 objections, the District Director, with one exception, denied its petition to revoke or modify the subpoena (*id.* at 145-152).[6] Respondent then appealed the District Director's determination to the Commission's General Counsel (*id.* at 154-163), asserting that the data available to the Commission did not "provide a basis for finding reasonable cause" (*id.* at 157). The General Counsel upheld the District Director's determination (*id.* at 164-168) and ordered respondent to comply with the subpoena by September 18, 1980 (*id.* at 168).

Respondent did not comply with the subpoena, but instead filed this suit in federal district court in Missouri to quash the subpoena and enjoin the Commission's investigation. Respondent alleged that the charge was invalid under Section 706(b) because it failed to disclose sufficient facts to form a basis for its allegations of discrimination.[7] Respondent sought extensive discov-

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[6] The District Director rejected arguments, *inter alia*, that the charge was filed without reasonable cause (J.A. 146), did not provide notice (*id.* at 146-147), was beyond the Commission's authority (*id.* at 147), sought irrelevant information (*ibid.*) and was overly burdensome (*id.* at 147). The Director, however, did modify the definition of "test" contained in the subpoena to eliminate any ambiguity (*id.* at 150).

[7] Respondent renewed a number of other objections to enforcement of the subpoena, contending, *inter alia*, that the subpoena contravened the terms of the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.*, the Trade Secrets Act, 18 U.S.C. (Supp. V) 1905, and

ery relating to all Commission subpoenas issued since 1976 (J.A. 50-51), pending commissioner's charges (*id.* at 52-53), internal Commission procedures for recommending commissioner's charges (*id.* at 52), Commission personnel practices regarding performance bonuses or merit awards (*ibid.*), and interagency communications regarding the Federal Reports Act (~~Pet. App.~~ at 51-52). In February 1981, the Commission filed an action in the Southern District of Illinois to enforce the subpoena. Civ. No. 81-5020 (S.D. Ill.) (J.A. 4). The enforcement action was transferred to Missouri, where the district court rejected respondent's arguments and enforced the Commission's subpoena (Pet. App. 15a-31a).

The district court concluded that respondent's "allegation that the Commissioner's charge does not specify sufficient facts is * * * meritless" (Pet. App. 24a). The court recognized that the "purpose of a charge under section 706, 42 U.S.C. § 2000e-5, is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case" (Pet. App. 24a). The court further noted that, under Commission regulations, a charge "is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of" (*id.* at 25a). 29 C.F.R. 1601.12(b). The court concluded that the present charge fully meets these requirements (Pet. App. 24a-25a).

On appeal, the Eighth Circuit reversed (Pet. App. 1a-14a.) The panel held that the charge failed to state "sufficient facts to comply with the date, place and circumstances requirements of section 706(b)" (Pet. App. 5a). The court of appeals found that the specification of July 2, 1965, as the beginning date for respondent's alleged continuing misconduct was insufficient because

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the Due Process Clause of the Fifth Amendment. See Pet. App. 17a-25a. The district court (*ibid.*) and the court of appeals (*id.* at 9a, 13a) rejected these claims.

"[w]e find no factual basis" to support the date (*id.* at 7a). The court further held that the circumstances of the charge must be supported by an articulated "factual basis" (*id.* at 8a). The court reasoned that "the factual basis for the charge enables the parties to determine whether conciliation is an appropriate remedy and aids the court and the employer in determining what evidence is relevant for discovery and what records must be retained in accordance with EEOC regulations" (*ibid.*). Notwithstanding Section 706(b), which provides that charges "shall contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5 (b)), the court concluded that "[a] sufficient Commissioner's charge should contain the following information: the type of information upon which the charge is based; the approximate dates of the alleged unlawful employment practices; the nature of the charge (*e.g.*, failure to hire, failure to promote, dismissal); and if an individual charge has been filed, the position of the aggrieved individual (*e.g.*, applicant, employee, former employee)" (Pet. App. 12a).

On July 20, 1982, the court denied the Commission's motion for rehearing en banc, Chief Judge Lay dissenting. Chief Judge Lay noted that the decision placed the circuit "in direct conflict with the decisions of all other courts of appeals addressing the issue of factual allegations in a Title VII charge" (Pet. App. 35a). Chief Judge Lay also criticized the practical impact of the panel decision on Commission enforcement procedures (*id.* at 38a):

> It would appear that the panel decision would require the Commission to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause. Furthermore, the court's decision would impose the pleading standards of the Federal Rules of Civil Procedure, Fed. R. Civ P. 8, upon an administrative fact-finding investigation. Such a position is supported

by neither logic nor precedent, and would severely undermine the Commission's ability to bring commissioner's charges of discriminatory patterns and practices as authorized under 42 U.S.C. § 2000-5[.]

SUMMARY OF ARGUMENT

1. Section 706(b) and its implementing regulations do not require the Commission to articulate the factual basis underlying a Commissioner's charge. Section 706 (b) expressly provides that "charges * * * shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). Commission regulations have consistently provided that a charge is sufficient if it identifies the parties and generally describes the action or practices complained of. 29 C.F.R. 1601.12(b). Prior to the decision below, the courts of appeals had uniformly upheld the Commission's interpretation of Section 706. "The purpose of the charge under section 706 is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case. * * * [The section] only requires a sufficient allegation to give the EEOC notice of what it is to investigate and put the respondent on notice of the practice or violation with which it is charged." *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 38 (4th Cir. 1971).

The decision below is also at odds with the legislative history of Section 706. As originally enacted, Section 706(a) required a commissioner's charge to "set[] forth the facts upon which it is based" (Pub. L. No. 88-352, 78 Stat. 259). Nevertheless, the courts of appeals uniformly concluded that Section 706 did not require the Commission to "plead evidence" (*Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d 237, 241 (9th Cir. 1971)). In the 1972 amendments to Title VII, Congress deleted the requirement that a commissioner's charge set forth "facts," substituting instead the notice provisions of Section 706(b) (42 U.S.C. 2000e-5(b)). Congress' determination that Title VII respondents should receive notice of

the "date, place and circumstances" of all charged discrimination (*ibid.*), however, does not justify the court of appeals' creation of factual pleading requirements for commissioners' charges. Section 706(b), as amended, was designed to notify a respondent that a charge is pending before the Commission; it does not impose "strict technical pleading requirement[s] upon complainants, whether they be private parties or the Commissioners of the EEOC" (*EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1338 (9th Cir. 1980)).

The court of appeals erred in requiring specification of the "factual basis" (Pet. App. 14a) for the date and circumstances of the discrimination alleged by Commissioner Norton. The charge in this case disclosed the precise circumstances justifying Commission inquiry into respondent's employment practices: allegedly discriminatory exclusion of blacks from six designated job categories and similar exclusion of women from seven such categories. The date utilized by Commissioner Norton, moreover, is "a good faith estimate of the probable time period[]" of respondent's misconduct. *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. The charge alleged a broad pattern of discrimination affecting all black and female employees in several job categories. Such a pattern or practice seldom, if ever, has a discrete beginning date, and the Commission cannot be required to provide any such date at the very threshold of its inquiry into an employer's discriminatory practices. Because respondent has been hiring blacks and women into its allegedly discriminatory employment system since the effective date of Title VII, Commissioner Norton's use of that date—July 2, 1965—as the starting date for respondent's misconduct was entirely proper. That date, moreover, fully informs respondent of the temporal scope of its alleged misconduct.

2. The district court's inquiry in a subpoena enforcement action is decidedly limited. A subpoena enforcement proceeding is not a forum for "'a general inquiry into the sufficiency of the evidence supporting a charge'"

(*Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36). Title VII "restrict[s] the district court's inquiry in subpoena enforcement actions to whether the information sought is material and relevant" (*EEOC* v. *K-Mart Corp.*, 694 F.2d 1055, 1065 (6th Cir. 1982)). Questions regarding the existence of reasonable cause and the appropriateness of particular remedies, therefore, "must await the completion of the administrative process before the district court may properly review them" (*EEOC* v. *Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977)).

Nor is more particularized pleading necessary to afford "fair notice" or prevent "abuse of governmental power" (Resp. Br. In Opp. 15, 17). The charge in this case clearly informed respondent of the substance of the allegations against it. It would be anomalous to require the Commission to plead evidence in order to commence an administrative investigation, when such particularity is not required to bring a civil enforcement action in federal court. Unless the Commission must present its proof along with its charge, "it is difficult to see what additional information the Commissioner should set forth as facts supporting [her] charge" (*Bowaters Southern Paper Corp.* v. *EEOC*, 428 F.2d 799, 800 (6th Cir. 1970)). The requirement that commissioners' charges be filed under oath, moreover, provides a safeguard for Title VII respondents against the possibility of an errant bureaucracy.

The objection that generally worded charges constitute mere "fishing expeditions" carries little force. "When investigative and accusatory duties are delegated by statute to an administrative body, it * * * may take steps to inform itself as to whether there is probable violation of the law." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 643 (1950). Because the "investigatory powers of the EEOC should be interpreted broadly" (*EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1066), any "fishing expedition" argument premised upon the parenthetical notice provisions of Section 706(b) is particularly unpersuasive.

"[I]t would be incongruous for Congress to create an administrative agency to function in a new sensitive and socially and economically important field * * * and then, by a parenthetical clause, disable it from normal and effective investigation." *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 242.

3. The decision below unduly intrudes the federal courts upon EEOC administrative proceedings at their very outset. Under that decision, the federal courts—not the Commission—would be the final arbiters of whether particular facts justify an administrative inquiry. But the courts should not be drawn into probing the "factual basis" of Commission charges any more than they should second guess whether other administrative agencies have properly issued an administrative complaint. "Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes." *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 243 (1980). The decision below erroneously and all too readily "enable[s] those subject to administrative authority unduly to delay investigations into their affairs." B. Schwartz, *Administrative Law* § 45, at 115 (1976).

ARGUMENT

The court of appeals erred in refusing to enforce the Commission's investigatory subpoena on the ground that the allegations in Commissioner Norton's charge lacked a "factual basis" (Pet. App. 14a). Contrary to the conclusion of the court below, the amended charge at issue here meets all the requirements of Section 706(b) and applicable Commission regulations and fully justifies Commission inquiry into respondent's employment practices. Commissioner Norton's charge was rendered under oath and identified the place of discrimination as respondent's Wood River facility (Pet. App. 44a, 47a). The charge, moreover, specified the circumstances justifying an inquiry into respondent's employment practices: allegedly

discriminatory exclusion of blacks from six designated job categories and similar exclusion of women from seven designated job categories (*id.* at 44a-45a). Finally, the charge, as amended, stated that respondent had engaged in such practices "on a continuing basis from at least July 2, 1965, until the present" (*id.* at 47a).

The court of appeals, contrary to uniform precedent, concluded that the charge failed to meet the notice provisions of Section 706(b) because it was not supported by an articulated "factual basis" (Pet. App. 14a) and specified July 2, 1965, as the starting date for the alleged discrimination (*id.* at 11a-12a).[8] The court ordered the case remanded to the district court to permit the Commission to provide a "factual basis" for the date and circumstances of the alleged discrimination (*id.* at 12a-14a). The detailed pleading requirement created by the court of appeals, however, unduly expands the scope of a summary subpoena enforcement proceeding, goes far beyond the requirement of fair notice, and erroneously intrudes the federal courts into an administrative proceeding at its very outset.

I. THE CHARGE IN THIS CASE FULLY SATISFIES THE REQUIREMENTS OF TITLE VII

A. Section 706(b) and its Implementing Regulations Do Not Require the EEOC to Articulate the Factual Basis Underlying a Commissioner's Charge

Title VII establishes "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). The primary purpose of a Section 706(b) charge is to initiate an administrative investigation to determine whether

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[8] The court noted that the "place" requirement of Section 706(b)'s notice provisions was not in dispute—the charge clearly identified the Wood River Refinery as the site of the alleged discrimination (Pet. App. 7a n.4).

there is reasonable cause to believe that an employer has violated Title VII. The initial charge does not commence a formal civil enforcement action against a respondent, but rather is merely the first step in an integrated procedure that emphasizes informal conciliation. Consistent with the discrete function of a Section 706(b) charge, Commission regulations and the prior decisions of the courts of appeals have uniformly established that a Commissioner's charge need not incorporate the detailed "factual basis" found necessary below (Pet. App. 14a). The legislative history of Section 706(b), moreover, clearly supports this conclusion.

1. Section 706(b) expressly states that "charges • • • shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). Commission regulations have consistently provided that a charge is sufficient if it generally describes the practices forming the basis of the complaint. See Equal Employment Opportunity Commission Procedural Regulations, 29 C.F.R. 1601.11(b). Current Commission regulations state that a charge should contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. 1601.12(a)(3). Notwithstanding those requirements, however, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." Section 1601.12(b). Commission regulations have never required Title VII charges to embody an articulated "factual basis" (Pet. App. 14a).

The district court applied the Commission's regulations to Commissioner Norton's charge and properly rejected respondent's assertion that the charge "does not specify sufficient facts" (Pet. App. 24a). The district court quoted 29 C.F.R. 1601.12(b), set out above, and concluded that "[a]ccording to this standard, the Commissioner's charge is sufficient, because it is a typewritten statement

which identifies the parties involved as being Shell Oil Company and the EEOC, and it describes generally the practices complained of as failing or refusing to recruit, hire, promote, train, assign, or select Blacks and/or females for managerial, professional, technical, craft, and service worker positions, *inter alia*, because of their race and/or sex" (*id.* at 25a). Because the charge was "sworn to by Commissioner Norton, and substantially complied with Commission guidelines" (*id.* at 25a), the district court rejected respondent's evidentiary attack as "meritless" (*id.* at 24a).

By contrast, the court of appeals, without adverting to the Commission's determination that generally worded charges are sufficient under Section 706(b), concluded that a valid charge requires "some factual or statistical basis" (Pet. App. 12a). The court of appeals erred in substituting its own sufficiency requirements for those adopted by the Commission.

The longstanding interpretation by a federal agency of its founding statute is entitled to great respect. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600, n.17 (1981). The deference accorded an agency's interpretation is particularly great when that interpretation has remained consistent over a long period of time. *Ibid.* See, *e.g.*, 31 Fed. Reg. 10269 (1966). In this case, where the question before the court of appeals centered upon the necessary procedures for instituting an administrative investigation, the Commission's consistent view that a Title VII charge need not specify the evidentiary basis for its allegations should have been virtually conclusive. As this Court has noted, "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Occidential Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 368. To paraphrase the opinion in *Occidental Life*, "[i]n view of the

federal policy requiring employment discrimination claims to be investigated by the [Commission] and, whenever possible, administratively resolved before suit is brought in federal court, it is hardly appropriate [to shift the determination of whether an initial charging document is sufficient from the Commission to the federal courts]." *Ibid.* The court of appeals accordingly erred in failing to defer to the Commission's construction of Section 706(b)'s requirements.

2. a. As originally enacted in 1964, Section 706(a) provided that a Commissioner's charge could be filed where a Commissioner of the EEOC had "reasonable cause to believe a violation of [Title VII] ha[d] occurred," and the charge "set[] forth the facts upon which it [was] based" (Pub. L. No. 88-352, 78 Stat. 259).[9] The wording of Section 706 essentially paralleled the provisions of Section 707(a), which even today authorizes the Attorney General to bring civil "pattern or practice" actions only where he has "reasonable cause to believe" that a "pattern or practice" of discrimination in violation of Title VII is occurring and the civil complaint "set[s] forth facts pertaining to such pattern or practice" (42 U.S.C. 2000e-6(a)).

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[9] The original version of Section 706 provided in pertinent part (Pub. L. No. 88-352, 78 Stat. 259):

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer * * * has engaged in an unlawful employment practice * * * the Commission shall furnish such employer * * * with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission.

Although the original version of Section 706 provided that a respondent would receive a copy of any charge filed by the Commission, the statute did not require that the charge be served within any particular time period.

The requirement that Commissioners' charges under Section 706 and civil complaints under Section 707 state the "facts" upon which they were based produced—quite predictably—a spate of early litigation. These cases, however, uniformly held that Title VII did not impose any specific factual pleading burden upon the Commission or the Attorney General. In *United States* v. *Gustin-Bacon Division, Certain-Teed Products Corp.*, 426 F.2d 539 (10th Cir. 1970), the court rejected the assertion that Section 707 imposed more onerous pleading burdens on the Attorney General than those required by the Federal Rules of Civil Procedure. The court searched the legislative history of Title VII and was "unable to find any expressed intent, clear or otherwise" to create "a requirement of detailed pleading" (426 F.2d at 543).[10] The Ninth Circuit relied on similar reasoning to reject the assertion that Section 706 "requir[es] a detailed statement of the underlying facts relative to the alleged acts of discrimination." *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d 237, 241 (1971). The court noted that Section 707 did not require detailed factual pleading and concluded "that to require the Commission to plead evidence in a [Section 706 charge] which is a step in an administrative investigation when the same language in the same statute does not require such specificity in a court action which seeks a judgment, would constitute topsy-turvy logic and we will not indulge in it" (439 F.2d at 243).

The subsequent decisions of other courts of appeals were in unanimous agreement with the Ninth Circuit's interpretation of Section 706. As the Fourth Circuit stated shortly after the decision in *Local 104*, "[t]he purpose of the charge under section 706 is only to initiate the EEOC investigation, not to state sufficient facts to make

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[10] The *Gustin-Bacon* court noted that a " 'requirement that facts be pleaded is illusory and unsound; and results in a battle over the form of pleadings that does not advance the action to an adjudication of the merits' " (426 F.2d at 542, quoting 2A Moore's Federal Practice ¶ 8.12 at 1692).

out a prima facie case. • • • [S]ection 706(a) only requires a sufficient allegation to give the EEOC notice of what it is to investigate and put the respondent on notice of the practice or violation with which it is charged." *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 38.[11] Accord, *Bowaters Southern Paper Corp.* v. *EEOC*, 428 F.2d 799 (6th Cir.), cert. denied, 400 U.S. 942 (1970); *New Orleans Public Service, Inc.* v. *Brown*, 507 F.2d 160 (5th Cir. 1975); *General Employment Enterprises, Inc.* v. *EEOC*, 440 F.2d 783 (7th Cir. 1971) (en banc); *Adolph Coors, Co.* v. *EEOC*, 464 F.2d 1270 (10th Cir. 1972), cert. denied, 410 U.S. 929 (1973); *Mountain States Telephone & Telegraph Co.* v. *EEOC*, 466 F.2d 541 (10th Cir. 1972); *Oklahoma Publishing Co.* v. *Powell*, 22 Fair Empl. Prac. Cas. (BNA) 1419 (1975) and 22 Fair Empl. Prac. Cas. (BNA) 1429 (10th Cir. 1978). The courts of appeals, therefore, uniformly upheld Title VII charges against attack on sufficiency grounds. Specifically, prior to the decision below, no court of appeals ever refused to enforce an EEOC investigatory subpoena on the ground that the administrative charge failed to specify its "factual basis" (Pet. App. 14a). On the contrary, the courts consistently enforced subpoenas based on charges that are no more specific factually than the one found deficient below.[12]

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[11] The *Graniteville* court recognized that if Section 706 required specific factual pleading, "charges initiating EEOC investigations would be held to a significantly higher standard than complaints filed in federal court by the Attorney General in Title VII civil actions" (438 F.2d at 39). Such a result, the court concluded, was "too great an anomaly to be attributed to Congress" (*ibid.*).

[12] See, *e.g.*, *Sparton Southwest, Inc.* v. *EEOC*, 461 F.2d 1055, 1058 (10th Cir. 1971) (charge alleges that "[r]espondent discriminatorily fails and/or refuses to recruit and/or hire Negroes, Indians and Spanish-Surnamed Americans in the same manner it recruits and/or hires Anglos"); *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 783 (commissioner's charge alleges that employer violates Title VII by "discriminatorily failing or refusing to hire Negroes and Jewish people"); *Bowaters Southern Paper Corp.* v.

b. Respondent argues that the above precedent is irrelevant to the interpretation of the current version of Section 706 (Resp. Br. In Opp. 19-20), and suggests that the 1972 amendments to Title VII significantly increased the pleading burden imposed upon the Commission by Section 706 (Resp. Br. In Opp. 21). We disagree.

The 1972 amendments to Title VII made two changes in Section 706 that are relevant to the present inquiry. First, the amendments eliminated the requirement that commissioners' charges be supported by reasonable cause. Instead, commissioners' charges, like the charges of any aggrieved complainant, must be in writing, under oath, and "contain such information and be in such form as the Commission requires" (42 U.S.C. 2000e-5(b)). Second, instead of explicating the "facts" upon which a charge is based, the Commission is required to "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" upon the respondent within 10 days (*ibid.*). See *EEOC* v. *Dean*

EEOC, *supra*, 428 F.2d at 800 (commissioner's charge alleges that employer "has engaged in the following unlawful employment practices: 1. Maintenance of racially restricted job classifications. 2. Discriminatory use of tests, restricting Negro employees to lower paying jobs. 3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs"); *New Orleans Public Service, Inc.* v. *Brown*, *supra*, 507 F.2d at 163-164 (charge quotes statistics to support allegation that "[r]espondent employer discriminatorily refuses or fails to recruit and hire Negroes, Spanish Surnamed Americans, Jews and females in the same manner it recruits and hires Caucasians," but court explicitly notes that charge would be sufficient "even without the statistical information which this charge contains"); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 34 n.1 (charge alleges that "Negroes are hired to the traditional Negro jobs and regardless of length of service, Negroes are not promoted or considered for better jobs as are the white employees"). These decisions implicitly recognize that a commissioner may, within his or her discretion, include underlying factual details in a charge. The charge, however, is valid so long as notice is given of the alleged unlawful practices. See, *e.g.*, *New Orleans Public Service, Inc.* v. *Brown*, *supra*, 507 F.2d at 163-164.

Witter Co., 643 F.2d 1334, 1337 (9th Cir. 1980). Nothing in either of these alterations to Section 706 suggests that Congress has sub silentio imposed a factual pleading requirement upon the Commission.

The legislative history of the 1972 amendments does not indicate that Congress intended to intensify the sufficiency requirements for a commissioner's charge under Section 706. Indeed, the 1972 amendments were designed, in large part, to increase the investigative and enforcement powers of the Commission. See generally *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 358-373.[13] At the time of those amendments, four circuits had concluded that Section 706 charges need only describe the alleged discriminatory conduct in general terms. *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241-243; *Bowaters Southern Paper Corp.* v. *EEOC*, *supra*, 428 F.2d at 800; *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784; *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 37-39. However, rather than continuing or strengthening the requirement that a commissioner's charge set forth "the facts upon which it is based" (Pub. L. No. 88-352, Section 706(a), 78 Stat. 259), Congress eliminated any factual pleading requirement entirely, substituting instead the notice provisions of Section 706(b). Congress, furthermore, expressly left the form and content of Section 706(b) charges to Commission discretion. *Ibid.* Congress, therefore, has plainly rejected any requirement that a Commissioner's charge set forth its underlying factual basis.[14]

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[13] Respondent's contention (Resp. Br. In Opp. 16-19) that the Commission lacks authority to investigate its employment practices therefore proceeds on a particularly weak foundation. See *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. In any event, as we have noted earlier, this issue is not properly before the Court. Pet. Reply Br. 9.

[14] Congress' undoubted awareness of the preamendment decisions rejecting the interpretation of Section 706 adopted by the court

The court of appeals did not discuss the legislative history outlined above. Instead, the court concluded that the notice provisions of amended Section 706(b) require the Commission to explicate the factual basis for an administrative charge (Pet. App. 6a-7a). But those notice provisions, properly construed, do not support the decision below.

Although the original version of Section 706 required service of the charge upon the respondent, prior to the 1972 amendments the section did not require service within any particular time period. To protect the charging party from reprisal, moreover, the Commission routinely delayed serving a copy of the charge until an EEOC officer was available to begin investigating the charge's allegations. See *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745 (5th Cir. 1972). Both the House and the Senate sought to alter this practice by requiring that a respondent be notified of a charge within a limited time period. See "Comparison of Title VII, as proposed to be amended by S. 2515 and H.R. 1746," 118 Cong. Rec. 300 (1972). The House proposal would have required service of the charge itself within five days of its filing. The Senate bill, however, which was eventually adopted by both houses, required service within 10 days of a "notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" (118 Cong. Rec. 300 (1972)).

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below underscores its failure to impose a factual pleading requirement upon Section 706(b). See *e.g.*, *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241-243. Congress' failure to act in the light of these decisions, while making other changes to the Act, indicates congressional approval. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 (1981); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). See also Section by Section Analysis of H.R. 1746, 118 Cong. Rec. 7166 (1972) ("In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII").

There is no indication that Section 706(b)'s notice provisions were designed to impose a stringent pleading standard on the Commission. As this Court has noted, Congress' concern in amending Section 706(b) "was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator." *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 371. Congress took the view that the Commission's previous notification procedures, under which a respondent might not receive notice of a pending charge for a significant period of time, unduly prejudiced the rights of employers. The notice provisions of Section 706(b), therefore, were drafted "to accord respondents fair notice that charges are pending against them" (118 Cong. Rec. 4941 (1972)). Contrary to the conclusion of the court below, the legislative purpose behind the notice provisions of Section 706(b) is precise and well-defined: Congress amended Section 706(b) to provide "prompt notification" to alleged violators (*Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 371). There is no evidence in the 1972 legislative history that Congress, by enacting a summary notice requirement and deleting a provision for service of the charge itself, intended to alter the well-established view that generally worded charges are sufficient under Title VII.

Except for the court below, every court of appeals that has considered the question has rejected the argument that the 1972 amendments to Section 706 create a detailed evidentiary pleading requirement for commissioners' charges. *EEOC* v. *Dean Witter Co.*, *supra*; *EEOC* v. *K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982). These decisions, like the earlier cases described above, recognize that Section 706(b) "impose[s] no strict * * * pleading requirement upon complainants, whether they be private parties or the Commissioners of the EEOC." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338.

In *Dean Witter*, the district court had refused to enforce a Commission subpoena on the ground that the

charge "failed to set forth the date, place, and circumstances of the charge as required by statute" (643 F.2d at 1336). Although the court of appeals concluded that the charge in that case did not adequately apprise the respondent of the date of its alleged misconduct, the court rejected any claim that amended Section 706 imposes a special pleading burden on the Commission. "We do not read the inclusion of the date, place and circumstances requirement as imposing onerous new pleading requirements upon the Commission" (643 F.2d at 1337). Specifically, the court concluded that the Commission's duty to provide a respondent with " 'the circumstances' of the alleged unlawful practice" does not create "a more burdensome requirement than the 'fact' pleading requirement of former § 706(a)," with the result that "our decision in *Local 104, Sheet Metal Workers* continues to provide the controlling principles to guide the form of EEOC charges" (643 F.2d at 1337, 1338). "The charge is merely the first step in the administrative process, and it would defeat the Congressional scheme to impose detailed fact pleading burdens on the EEOC before it has had an opportunity to investigate the basis for the charge" (*id.* at 1338). The court therefore held that a charge alleging "company-wide" discrimination is sufficient to meet the "place" requirement of Section 706(b) and a "listing of the nature of the alleged employment practices, even though essentially conclusory in nature, [is] sufficient to comply with the 'circumstances' requirement" (*id.* at 1337).[16] Significantly, the charge in *Dean Witter*, like the charge in this case, set forth the alleged

[16] The court sustained the district court's refusal to enforce the Commission's investigatory subpoena on the ground that the charge did not disclose whether the alleged illegal practices "occurred in the past, or at least, when they began in the past" (643 F.2d at 1338). Following the *Dean Witter* decision, and as demonstrated by the present case, the Commission has amended many outstanding "pattern or practice" charges to include "a good faith estimate of the probable time periods [involved]" (643 F.2d at 1338). See *infra*, pages 26-31.

unlawful practices in general terms without any supporting "factual basis" (Pet. App. 9a, 14a).[16]

In *EEOC* v. *K-Mart Corp.*, *supra*, the Sixth Circuit issued a writ of mandamus to vacate an order of the district court that allowed K-Mart to depose a Commissioner of the EEOC and other Commission employees.[17] The appellate court examined the language and legislative history of Section 706 and concluded that "[n]othing in Title VII * * * authorizes a district court in a subpoena enforcement proceeding to allow discovery concerning the facts underlying a charge of discrimination" (694 F.2d at 1065). The court specifically disagreed with the holding in the present case that "section 706(b) re-

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[16] The charge in *Dean Witter* alleged that the employer had discriminated against Blacks, women, Spanish-surnamed Americans and other minorities on the basis of race, sex, and national origin by policies that included but were not limited to (643 F.2d at 1336 n.1):

> 1. Refusing to recruit and hire Blacks, women, Spanish-surnamed Americans and other minorities in the same manner and on the same basis in which white males have been recruited and hired;
>
> 2. Discriminatorily assigning and limiting Blacks, women, Spanish-surnamed Americans and other minorities to positions with lower pay and less opportunity for advancement than those to which white males have been assigned and hired;
>
> 3. Refusing to provide training and promotion opportunities for Blacks, women, Spanish-surnamed Americans and other minorities in the same manner in which such opportunities have been provided white males;
>
> 4. Discriminatorily subjecting Blacks, women, Spanish-surnamed Americans and other minorities to different terms and conditions of employment, including leave, benefits, and standards for disciplinary actions and terminations, than those which are applied in the case of white males.

[17] K-Mart obtained the discovery order during the course of a subpoena enforcement proceeding opposed by the company on grounds virtually identical to those advanced by the respondent here. 694 F.2d at 1058-1059.

quires 'some basis in fact'" (*id.* at 1063 n.7). The court noted that such a requirement "is contrary to well-established law" (*ibid.*).

Thus, as Chief Judge Lay noted in dissenting to the denial of rehearing en banc, the decision below is "in direct conflict with the decisions of all other courts of appeals addressing the issue of factual allegations in a Title VII charge" (Pet. App. 35a). Section 706, as originally enacted, did not require the Commission to provide the "factual basis" found necessary below (Pet. App. 14), and nothing in the 1972 amendments to Title VII alters that result.

B. The Date Provided by the Amended Charge Fully Satisfies the Notice Provisions of Section 706(b)

The charge in this case, as originally filed, alleged that respondent had engaged in continuing misconduct, but did not include a specific beginning date for the unlawful employment practices delineated by Commissioner Norton (Pet. App. 44a-45a). Following the Ninth Circuit's decision in *Dean Witter Co.*, *supra*, the charge was amended by Commissioner Norton to allege that respondent had engaged in the identified practices "on a continuing basis from at least July 2, 1965, until the present" (Pet. App. 47a). The court of appeals, however, concluded that specification of July 2, 1965, as the beginning date of respondent's alleged misconduct was insufficient to provide the notice required by Section 706 because it lacked a "factual basis" and did not notify respondent "of the parameters of the investigation" (Pet. App. 11a-12a). Neither objection is sound.

1. The Commission, at the very threshold of its inquiry into an employer's allegedly discriminatory practices, cannot be required to provide the precise date that a pattern or practice of discrimination began. As the Ninth Circuit has concluded, Section 706(b) does not mandate more than a "good faith estimate of the probable time periods" involved. *EEOC* v. *Dean Witter Co.*,

supra, 643 F.2d at 1338.[18] Such an estimate, moreover, was plainly given in Commisisoner Norton's amended charge.

The charge lodged by Commissioner Norton described a broad pattern or practice of discrimination affecting all black and female employees in several job categories. Unlike an individual complaint arising from a specific incident on a given date, a pattern or practice charge is based on the aggregate of many individual employment decisions over a period of time. Such a pattern or practice seldom, if ever, has a discrete beginning date. Indeed, the theory behind such a charge is that nondiscriminatory employment practices will, over the course of time, result in a workforce whose composition approximates that of the available labor force, while discriminatory practices will result in substantial disparities between the two figures. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977). Positing a precise beginning date for discriminatory conduct when such statistical disparities arise is, at best, conjectural. The difficulties are compounded when the time frame must be estimated at

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[18] In *EEOC* v. *Dean Witter Co.*, *supra*, the Ninth Circuit refused to enforce a Commission subpoena because the Commissioners' charge upon which it was based did not disclose whether the alleged unlawful employment practices "occurred in the past, or at least, when they began in the past" (643 F.2d at 1338). The court, however, did not insist upon a "factual basis" for the beginning date of the conduct described in a Section 706(b) charge. The court emphasized that it was not imposing "strict technical pleading requirement[s]" upon the Commission or other complainants (643 F.2d at 1338). Because the "filing of a charge is the first step in the EEOC administrative process, and understandably, the EEOC may be uncertain about the temporal scope of the challenged practices," the court concluded that "a good faith estimate of the probable time periods should be sufficient" to meet the requirements of Section 706(b) (643 F.2d at 1338). That result should especially obtain, the court noted, "where a pattern or practice charge is involved" (*ibid.*).

the charging stage of a Commission proceeding, before the Commission has had the opportunity to investigate the possible underlying causes of any statistical disparity.[19]

The Commission has not, as respondent alleges, utilized the effective date of Title VII as "boilerplate" in all outstanding pattern or practice charges (Resp. Br. In Opp. 12 n.7).[20] Rather, the Commission has carefully considered the evidence in each case in arriving at an appropriate starting date for the charged misconduct. The Commission has generally limited the use of July 2, 1965, to those cases where special circumstances indicate a history of assignment or promotion discrimination that has been continued or perpetuated by collective bargaining agreements. Specification of the effective date of Title VII as the beginning date of the charged discrimination is appropriate in such cases in order to facilitate seniority relief to the full extent permitted by law.

Commissioner Norton considered an amendment to the effective date of Title VII appropriate in this case because

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[19] It was precisely because of these difficulties that the Commission, prior to the decision in *Dean Witter*, considered that its notice obligations under Section 706(b) were fulfilled by providing in a pattern or practice charge that the alleged misconduct was of a continuing nature. Following *Dean Witter*, however, the Commission has sought to amend outstanding pattern or practice charges to specify a beginning date for the charged discrimination. But see *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (questioning whether Section 706(b) requires a charge to specify a beginning date, apart from the date of the charge itself).

[20] Respondent appears to have assumed that the Commission has a policy of amending all outstanding charges to include July 2, 1965, as the beginning date for the charged discrimination because that date was utilized in the charge at issue in *EEOC* v. *K-Mart Corp.*, *supra*. That assumption is completely unfounded. Of 139 outstanding systemic commissioners' charges being handled through the Office of Systemic Programs, only 19 have been amended to reflect the July 2, 1965, date as the beginning of the charged discrimination. This practice refutes any suggestion that July 2, 1965, is inserted as "boilerplate" into "every case" (Resp. Br. In Opp. 12 n.7) without reference to the special circumstances of each charge.

respondent's statistical record indicated a pattern or practice of confining women to office/clerical positions and of confining Blacks to operative and laborer positions. Because respondent has been hiring women and Blacks into this allegedly discriminatory system since the effective date of Title VII, Commissioner Norton's use of July 2, 1965, in her amended charge is an entirely reasonable and good-faith estimate of the probable time period of respondent's misconduct.[21] *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338. The court of appeals erred in requiring a more specific "factual basis" for the date utilized by Commissioner Norton.

2. The court below held that Commissioner Norton's use of July 2, 1965, lacked not only a "factual basis," but also failed to give "notice to the employer of the parameters of the investigation" (Pet. App. 11a). Cf. *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1063 (the effective date of Title VII "does not give the employer, the district court, or the EEOC's investigators any objective basis to determine the temporal scope of the investigation").[22]

This objection is unsound because neither the scope of the Commission's investigation nor the scope of an enforcement action is limited by the form or content of a charge under Section 706(b). "Any violations that the

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[21] This case is unusual, in that respondent has actually supplied the Commission with statistical data extending to the effective date of Title VII; its first EEO-1 report was filed with the Commission in April 1966. That first EEO-1 report contains a description of respondent's total employment statistics for the Wood River Refinery as of February 25, 1965.

[22] The Sixth Circuit's suggestion in *EEOC* v. *K-Mart Corp.*, *supra*, that the Commission's use of the effective date of Title VII does not satisfy the date requirement of Section 706(b) may well have been influenced by the district court's finding that the Commission "had a policy of inserting pro-forma the effective date of Title VII" into commissioners' charges (694 F.2d at 1063). As shown above (note 20), however, the Commission has no such policy.

EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 331 (1980). Although Section 706(b) charges are a condition precedent to agency action under Title VII, they, like their counterpart charges under the National Labor Relations Act, do not limit the scope of any subsequent findings of reasonable cause by the Commission, nor do they define the limits of a resulting Commission enforcement action. Their "purpose is merely to set in motion the machinery of an inquiry." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959).[23] As respondent concedes, "[t]he charge does not * * * reduce the ability of the Commission to expand the scope of its investigation" (Resp. Br. In Opp. 27). In short, because a Section 706(b) charge does not define the limits of a Commission investigation, conciliation action, or subsequent prosecution, the court below erred in refusing to enforce the Commission's subpoena on the ground that Commissioner Norton's charge failed to set such limits.

"Since a Commissioner's charge does no more than initiate administrative fact finding and * * * conciliation," there is no sound basis for requiring the Commission to provide a specific, factually supported beginning date for the misconduct alleged in a charge. *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784. The charge in this case notified respondent that Commissioner Norton had reason to believe that the company had engaged in specified misconduct since at least July 2, 1965. The company, therefore, was given a clear indication of the temporal and substantive scope of its alleged mis-

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[23] The National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, which served as the remedial model for Title VII, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 366 (1977), has often guided courts in construing Title VII. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803-804 (1973); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-769 (1976).

conduct. The fact that the temporal boundaries of that misconduct are broad is not a valid ground for objection; the Commission is clearly entitled to investigate misconduct since the effective date of Title VII.[24] Because respondent cannot legitimately complain of a lack of notice regarding the temporal scope of its alleged misconduct, the company's probable concern with the date provided in Commissioner Norton's charge is that it indicates a far-reaching Commission investigation of its employment practices. Any such concern, however, did not justify the lower court's refusal to enforce the Commission's subpoena, which sought information only for the period 1976 to 1980.[25]

Respondent has received all the notice that Section 706(b) requires—a concise statement of what it has allegedly done in violation of Title VII of the Civil Rights Act of 1964. See *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 372-373 & n.32. The "date" and "circumstances" requirements of Section 706(b) do not require the technical precision respondent would impose on the Commission prior to the agency's investigation. The respondent is of course entitled to argue to the Commission that it did not commit the described unlawful acts in the time period charged in this case. Respondent, however, may not claim that it does not know what it is charged with doing.

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[24] Indeed, the Commission may properly investigate employment practices even before the effective date of Title VII. Past discrimination, even if not legally cognizable, may establish a pattern or practice of discrimination or show the motive or intent behind present practices. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977).

[25] There is no substance to the assertion that July 2, 1965, is insufficient as a matter of law to provide an employer with notice of the beginning date of its discriminatory practices (Resp. Br. In Opp. 12-15). If accepted, the argument would mean that the worst offender under Title VII—the employer that had never acted to integrate its segregated workforce after the passage of Title VII—could not be accurately charged under the Act simply because of the extent of its discrimination.

II. THE REASONS GIVEN BY THE COURT OF APPEALS FOR REJECTING THE COMMISSION'S INTERPRETATION OF SECTION 706(b) ARE UNPERSUASIVE

The court of appeals reasoned that commissioner's charges must be supported by an articulated "factual basis" in order to "enable[] the parties to determine whether conciliation is an appropriate remedy and aid[] the court and the employer in determining what evidence is relevant for discovery" (Pet. App. 12a). The court further stated that a charge "without some factual or statistical basis gives the appearance of a 'fishing expedition' and fails to give the employer sufficient notice" (*ibid.*). These grounds for the decision below, however, do not withstand scrutiny. The scope of a subpoena enforcement action is decidedly limited and does not extend to such inquiries as "whether conciliation is an appropriate remedy" (Pet. App. 12a). The level of notice mandated by the court below, moreover, is at odds with the limited function of a Section 706(b) charge and is not required to prevent abuse of authority. Finally, any concern that a generally worded commissioner's charge would permit an unwarranted "fishing expedition" is largely illusory.

A. There Is No Need for the Commission to Specify the Factual Basis for a Section 706(b) Charge in Order to Obtain Enforcement of an Investigative Subpoena

The court of appeals suggested that the factual basis for a commissioner's charge must be provided to enable the parties to determine the applicability of certain remedies (Pet. App. 12a) and to "protect the employer from an open-ended investigation" (*id.* at 11a). The factual pleading requirement fashioned by the court of appeals, however, goes far beyond the narrow range of issues legitimately raised in a subpoena enforcement proceeding.

The district court's inquiry in a subpoena enforcement action is "extremely limited." *NLRB* v. *Fredrick Cowan*

& *Co.*, 522 F.2d 26, 28 (2d Cir. 1975); *NLRB* v. *International Medication Systems, Ltd.*, 640 F.2d 1110, 1114 n.2 (9th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 308-309 (7th Cir. 1981). This Court has established that, in general, administrative subpoenas should be enforced by the federal courts "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). See also *United States* v. *Powell*, 379 U.S. 48, 57 (1964). While a Section 706(b) charge is a prerequisite to an EEOC investigation, "[r]easonable cause for finding a Title VII violation need not be established before an administrative subpoena may be validly issued." *EEOC* v. *Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977). Accord, *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1066; *EEOC* v. *University of New Mexico*, 504 F.2d 1296, 1303 (10th Cir. 1974); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36. "Rather, it is the function of such investigative subpoenas to establish whether reasonable cause to bring a discrimination charge exists." *EEOC* v. *Chrysler Corp.*, *supra*, 567 F.2d at 755. A district court requested to enforce a Commission subpoena, therefore, is "limited to determining whether the subpoenaed information is material and relevant to the investigation of a potential violation" (*ibid.*).[26] A subpoena enforcement proceeding is not a forum for " 'a general inquiry into the sufficiency of the evidence supporting a charge.' " *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36. Questions regarding the existence

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[26] See also *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065 (Title VII "restrict[s] the district court's inquiry in subpoena enforcement actions to whether the information sought is material and relevant"); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36 (the standard to be applied in subpoena enforcement proceedings "is one of relevancy and materiality, not one of reasonable cause to believe the charge is true").

of reasonable cause and the appropriateness of particular remedies "must await the completion of the administrative process before the district court may properly review them." *EEOC* v. *Chrysler Corp.*, *supra*, 567 F.2d at 755.[27]

The court of appeals' decision disregards the limited nature of an EEOC subpoena enforcement proceeding. An investigatory subpoena is issued as part of an administrative inquiry into whether there is reasonable cause to believe that a charge lodged under Section 706 (b) is true. 42 U.S.C. 2000e-5(b). The net effect of the lower court's factual pleading requirement, however, is to "require the Commission to show extrinsic evidence of reasonable cause in order to conduct an investigation to determine reasonable cause" (Pet. App. 38a; Lay, C.J., dissenting from denial of rehearing en banc). Indeed, the Sixth Circuit rejected the opinion below as "contrary to well-established law" precisely because "[i]n subpoena enforcement proceedings, the EEOC usually does not have to prove probable cause or reasonable cause to believe that a charge of discrimination is true." *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1063 n.7. Because such a pleading requirement would necessarily entangle federal district courts in second-guessing the factual sufficiency of charges filed by the Commission, the decision below "place[s] the cart before the horse," and "substitute[s]

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[27] Neither the charge itself, nor the notice of the charge provided by Section 706(b), were designed by Congress to "enable[] the parties to determine whether conciliation is an appropriate remedy" (Pet. App. 12a). That determination must await the conclusion of the Commission's investigation and even then is contingent upon a finding of reasonable cause. 42 U.S.C. 2000e-5(b). As this Court stated in *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 601 (1981) (footnote omitted), disclosure by the Commission to the charging party of information developed in the course of the Commission's investigation is authorized precisely because such "disclosure enhances the Commission's ability to carry out its statutory responsibility to resolve charges through informal conciliation and negotiation: A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own."

a different driver for the one appointed by Congress." *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36. Such broad-scale expansion of the issues to be determined in summary subpoena enforcement actions should not be countenanced by this Court.[28]

B. The Commission's Practice of Issuing Generally Worded Charges Provides Adequate Notice and Does Not Result In Abuse of Commission Authority

1. Respondent argues that Section 706(b) requires the Commission to provide it with a "statement of the specific incidents or employment practices alleged to be discriminatory" (Resp. Br. In Opp. 12). The record in this case, however, shows that respondent has received just such a statement.

The charge in this case notified the respondent that a Commissioner of the EEOC had reason to believe that the company had excluded blacks from "managerial, professional, technical, office-clerical, craft, and service workers positions," and had confined women to office and clerical positions (Pet. App. 44a). The charge, as amended, informed the respondent that the Commission had reason to believe that the company "had engaged in the identified unlawful employment practices on a continuing basis from at least July 2, 1965, until the present" (*id.* at 47a). The statistics upon which the charge was based, moreover, were provided by the respondent itself.[29]

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[28] Traditional subpoena enforcement procedures are fully sufficient to protect against overly expansive administrative inquiries (Pet. App. 11a). In examining whether "the information sought [by a Commission subpoena] is material and relevant" (*EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065), a district court may properly consider whether a subpoena is indefinite or unduly burdensome. *EEOC* v. *Bay Shipbuilding Corp.*, *supra*, 668 F.2d at 308-310. Cf. *United States* v. *Powell*, *supra*, 379 U.S. at 58.

[29] Published Commission guidelines put respondents on notice that Commissioners' charges are based on an analysis of "EEO reporting data" (Pet. App. 41a-42a). Contrary to the conclusion of the court of appeals, therefore, there is little practical need to provide respondents with "notice" of the statistical data upon

Thus, the charge clearly informed respondent of the substance of the allegations against it. Unless the Commission must present its proof along with its charge, it is difficult to see how additional "facts" would provide more "notice" to respondent at the very outset of this proceeding. Indeed, as the Sixth Circuit has noted, "it is difficult to see what additional information the Commissioner should set forth as facts supporting [her] charge." *Bowaters Southern Paper Corp.* v. *EEOC*, *supra*, 428 F.2d at 800.[30]

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which commissioners' charges are based (Pet. App. 11a n.5); respondents already have such reporting data in their possession. The record in this case demonstrates that the respondent was well aware that its EEO-1 reports supplied the basis for Commissioner Norton's charge. See J.A. 92, 157.

[30] The Commission has provided the Court with the statistical breakdown by job classification of the Wood River Refinery for the years 1970-1978 (Pet. Reply Br. 4-5). The Commission supplied these data in response to respondent's reliance on misleading aggregate employment statistics (Resp. Br. In Opp. 14, 17 n.12) and to counter respondent's suggestion that the systemic enforcement program is somehow irregular in that it does not rely on "specific evidence of discrimination" (*id.* at 2; see also *id.* at 11).

Analyzed by job category, the statistical data provided by respondent's EEO-1 reports for the nine years preceding the charge show the complete exclusion of women from its managerial staff of over 230, despite an availability in 1978 of 16.9% women in the St. Louis Standard Metropolitan Statistical Area (SMSA) (Pet. Reply Br. 4-5). The data also show gross underrepresentation of women in every other job category except office/clerical. In 1978, for example, respondent employed one woman in its force of 763 craft workers despite 7.8% female SMSA availability in this job category; one woman in 22 service workers (56.7% female availability); one woman in 84 technical workers (39.6% availability) and 23 women in 422 operative and laborer workers (24.3% availability).

Blacks fared little better. In 1978, one black was employed in a managerial staff of 238, contrasted with 4.3% black SMSA availability in that year. The EEO-1 reports disclose that in 1978 respondent employed 19 blacks in its force of 763 craft workers compared with 8.2% black SMSA availability; one black in 22 service workers (30.1% black SMSA availability); and 3 blacks

Respondent's "notice" arguments are unpersuasive for another important reason. The commissioner's charge in this case clearly indicated the parties involved, identified the location of the putative discriminatory activities, and alleged that the respondent had confined its women employees in office and clerical positions and its black employees in operative and laborer positions from at least the effective date of Title VII. Since such allegations would certainly be sufficient to provide notice in a complaint brought by the Commission in federal court after a finding of reasonable cause, it would be highly anomalous to require the Commission to plead the evidence supporting its allegations at the threshold of its administrative investigation. Although the respondent argues that "a charge under Title VII is not to be compared to a complaint under the Federal Rules of Civil Procedure" (Resp. Br. In Opp. 27), there is certainly no reason to impose on Section 706(b) charges "a standard even more strict than that required by our Rules of Civil Procedure, notwithstanding that the pleadings are even less significant in the administrative process than in the judicial." *Sparton Southwest, Inc.* v. *EEOC*, *supra*, 461 F.2d at 1059. Accord, *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1337; *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 243; *Graniteville Co. (Sibley Division)* v.

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in 84 technical workers (13.2% SMSA availability). Blacks were also underrepresented as office/clerical workers, constituting 9 of 96 in 1978 at their highest level in 9 years (12.1% SMSA black availability), and, except for 1976 and 1978, were similarly underrepresented in the professional worker category (Pet. Reply Br. 4-5).

The Commission did not introduce these data below because of its position, to which it adheres, that it is not required to provide such information in order to obtain enforcement of a subpoena issued pursuant to a commissioner's charge. A subpoena enforcement action should not become, as this one has, a "mini-trial" on the merits of the administrative charge, with the respondent attacking the merits of the charge (Resp. Br. In Opp. 3-5) and requesting discovery to ascertain the "validity" of the charge (*id.* at 19; see also *id.* at 5, 9, 17 n.12).

EEOC, *supra*, 438 F.2d at 39 & n.7; *General Employment Enterprises, Inc.* v. *EEOC*, *supra*, 440 F.2d at 784. The extensive "notice" requirements imposed by the court below, therefore, are "inconsistent with the enforcement scheme of Title VII." *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1067.

2. The factual pleading requirements imposed below are necessary, respondent asserts, to prevent "abuse of governmental power" (Resp. Br. In Opp. 17). Congress, however, has specifically provided the means of safeguarding Title VII respondents from an errant bureaucracy by requiring that commissioner's charges be under oath—there is no need for the federal courts to erect additional barricades. *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338; *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065 & n.12.

The contention that Title VII demands factually specific allegations to prevent the filing of irresponsible charges is hardly novel; indeed, it was raised in some of the earliest EEOC subpoena enforcement cases. In *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 39, the district court had refused to enforce a Commission subpoena because "Congress intended to deny the Commission the broad investigatory powers of other federal agencies and to carefully circumscribe its authority of investigation." The Fourth Circuit, however, flatly rejected this conclusion. After an extensive examination of the legislative history of Title VII (438 F.2d at 39-41), the court of appeals found that the Commission's investigatory powers were not narrowly confined (*id.* at 41). The court, moreover, concluded that a factual pleading requirement was not necessary to prevent "abuse of authority" (Resp. Br. In Opp. 15). "Congress sought to control mere 'fishing expeditions' by requiring investigations to be preceded by the filing of a charge by a party claiming to be aggrieved or by a Commissioner with sufficient prior information to have reasonable cause to believe that a statutory violation had occurred" (438 F.2d at 41). The

Ninth Circuit, in an opinion published just a few weeks later, reached the same conclusion for virtually identical reasons. *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 242.

As explained earlier, Congress amended Section 706(a) subsequent to the above decisions, eliminating the requirement that a commissioner's charge be supported by "reasonable cause to believe a violation of [Title VII] has occurred" (Pub. L. No. 88-352, 78 Stat. 259). Instead, Congress provided that Commissioner's charges shall be under oath. 42 U.S.C. 2000e-5(b). The substitution of an oath for a reasonable cause requirement, however, can hardly be viewed as diluting the *Graniteville* and *Local 104* court's conclusions regarding the necessity of factual pleading to avert capricious governmental action.

In *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338, the respondent to a Commission subpoena renewed the argument that the EEOC has "limited investigatory powers" and must therefore file "detailed and specific" charges to avoid abuse of its authority. The Ninth Circuit, as it had in *Local 104*, rejected the argument. The court observed that the 1972 amendments to Title VII were designed to "strengthen the investigatory power of the EEOC" (643 F.2d at 1338). In these circumstances, the court noted, the respondent's argument "has even less force * * * than it did in 1971" (*ibid.*). The court concluded that Section 706(b) does not require the Commission to draft detailed factual pleadings for final approval by a federal court. "[T]he good faith of high level government officials [is] a sufficient check on the filing of irresponsible charges" (643 F.2d at 1338). Accord, *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1065.

C. Any Concern that Generally Worded Charges Lead to Improper "Fishing Expeditions" is Insubstantial

The court of appeals concluded that, "without some factual or statistical basis," a Section 706(b) charge "gives the appearance of a fishing expedition" (Pet.

App. 12a). The Commission's incipient investigation into respondent's allegedly unlawful employment practices, however, should not fall before the "colorful and nostalgic slogan 'no fishing expeditions'" (*United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 642).

This Court has noted that "fishing expedition" objections carry little force in the context of administrative investigations. In *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 642, the Court wrote that, although courts may not "go fishing," administrative agencies are not so strictly limited. In addition to judicial functions, administrative agencies are "charged with seeing that the laws are enforced," and they may therefore "exercise powers of original inquiry" (*ibid.*). "When investigative and accusatory duties are delegated by statute to an administrative body, it * * * may take steps to inform itself as to whether there is probable violation of the law" (*id.* at 643). "Fishing expedition" objections to administrative investigations, therefore, must be viewed with some skepticism because "[t]he only power that is involved * * * is the power to get information from those who best can give it and who are most interested in not doing so" (*id.* at 642). Respondent's construction of a "fishing expedition" argument upon the parenthetical notice provisions of Section 706(b) is particularly unpersuasive. "[I]t would be incongruous for Congress to create an administrative agency to function in a new sensitive and socially and economically important field * * * and then, by a parenthetical clause, disable it from normal and effective investigation." *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 242.

"It is well settled that the investigatory powers of the EEOC should be interpreted broadly." *EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1066. Accord, *EEOC* v. *University of Pittsburgh*, 643 F.2d 983 (3d Cir.), cert. denied, 454 U.S. 880 (1981); *EEOC* v. *University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974); *Motorola, Inc.* v. *McLain*, 484 F.2d 1339 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *EEOC* v. *Cambridge Tile*

Manufacturing Co., 590 F.2d 205 (6th Cir. 1979). Sections 709(a) and 710 of Title VII authorize the Commission to issue subpoenas following the filing of a charge under Section 706 (42 U.S.C. 2000e-5, 2000e-8(a), 2000e-9), and, as explained above, the Commission does not have to establish reasonable cause to believe that the charge is true—*i.e.*, explicate its "factual basis" (Pet. App. 14a)—in order to obtain enforcement of those subpoenas. Respondent, by its vigorous assertion that the charge in this case had "no purpose other than the initiation of a fishing expedition by [the Commission]" (Resp. Br. In Opp. 23), persuaded the court below that Section 706(b) required "a detailed statement of the underlying facts relative to the alleged acts of discrimination." *Local 104, Sheet Metal Workers* v. *EEOC*, *supra*, 439 F.2d at 241. But, as the Ninth Circuit correctly noted, that interpretation of Section 706 would mean "that the Commission, in its investigation, must not ask any questions to which it does not already know the answers." *Ibid.* Such a result, like the phrase "fishing expedition" itself, "has about it the aura of another, and bygone, legal era." *Ibid.* See also *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 36; *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338; *New Orleans Public Services, Inc.* v. *Brown*, *supra*, 507 F.2d at 162 n.2, 164.

III. THE DECISION BELOW RESULTS IN AN UNWARRANTED INTRUSION UPON AN ADMINISTRATIVE PROCEEDING AT ITS VERY OUTSET

Although the court of appeals couched its decision in terms of "notice" (Pet. App. 12a), the pleading requirement created by the court goes far beyond any generally recognized concept of notice. By mandating that the Commission disclose the evidence underlying a Section 706(b) charge, the court has imposed a significant limitation on the Commission's administrative discretion. Under the decision below, the federal district courts—not the EEOC—would become the final arbiters of whether the information in the Commission's possession

justifies the issuance of a charge and the commencement of an administrative investigation. Respondents to Section 706(b) charges would reflexively challenge the Commission to demonstrate the "facts" supporting a proposed investigation of their employment practices and, like the respondent here, would request depositions of commissioners and other EEOC staff members to inquire into the "factual basis" and "validity" of pending discrimination charges. See, *e.g.*, Resp. Br. In Opp. 5, 9, 19. The end result would be that the investigator would become the investigated, and the orderly processing of discrimination claims under Title VII would grind to a halt.[31]

The court of appeals' interruption of the Commission's investigation into respondent's employment practices should not be countenanced. The court below has stymied an administrative investigation because of the purported insufficiency of an administrative charge. That result is clearly contrary to the Court's emphatic holding in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980) ("*Socal*"), that federal courts may not intrude upon an administrative proceeding at its very outset.

In *Socal*, the Court held that the issuance of an administrative complaint by the Federal Trade Commission does not constitute final agency action reviewable under 5 U.S.C. 704. The statute at issue in *Socal* permitted issuance of an administrative complaint if the FTC had "reason to believe" that a violation of the law had occurred (449 U.S. at 234). The respondent in that case asserted, as did the respondent here (J.A. 157), that the FTC's complaint was invalid because the agency did not

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[31] The decision in this case will affect well over 100 pending commissioners' charges. The great majority of these charges, moreover, have been filed by commissioners who have served their terms and left the government. The legal and administrative difficulties created by the court of appeals' decision are therefore compounded by the fact that it is unclear whether a sitting commissioner can amend a charge to state what factual basis a former commissioner might have considered when issuing the charge.

have enough information to have "reason to believe" that the law had been violated (449 U.S. at 235, 237). The Court, however, concluded that, unlike the promulgation of administrative regulations, the issuance of an administrative complaint is not a final agency action subject to judicial review because a complaint merely represents "a threshold determination that further inquiry is warranted" (*id.* at 241). Review at the charging stage of an administrative proceeding, the Court stated, results in "interference with the proper functioning of the agency," "denies the agency an opportunity to correct its own mistakes" and "results in inefficient and perhaps unnecessary piecemeal review" (*id.* at 242).

Under the principles enunciated in *Socal*, Commissioner Norton's decision to initiate the administrative process in this case was well within her lawful discretion. Congress has charged the Commission with the responsibility to make the initial determination of whether unlawful employment practices exist (42 U.S.C. 2000e-5(b); *Graniteville Co. (Sibley Division)* v. *EEOC*, *supra*, 438 F.2d at 35; *EEOC* v. *South Carolina National Bank*, 562 F.2d 329, 331-332 (4th Cir. 1977)), and federal courts should not probe the "factual basis" of Commission charges any more than they should second guess whether the FTC has properly issued an administrative complaint. See generally *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943).

Like the administrative complaint at issue in *Socal*, Commissioner Norton's charge in this case "is not a definitive statement of position" (449 U.S. at 241); the charge has no dispositive effect on the rights, privileges, duties or liabilities of respondent.[32] A commissioner's charge has no "determinate consequences" (*ITT* v. *Local 134, IBEW*, 419 U.S. 428, 443 (1975)), and is therefore

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[32] Indeed, respondent admits that Commissioner Norton's charge does not require the company to do or refrain from doing anything: "The charge does not frame the issues in litigation, nor does it require an answer from the respondent" (Resp. Br. In Opp. 27).

not subject to routine judicial oversight, precisely because it is merely a preliminary step that signals the commencement of an agency investigation.[33] Review at the charging stage of an administrative proceeding, moreover, is particularly disruptive. As the facts of this case vividly demonstrate, judicial inquiries into the factual basis for an administrative charge interfere with the "proper functioning of the agency" and create a substantial "burden for the courts" (*Socal*, *supra*, 449 U.S. at 242). Judicial review at this point, furthermore, does not advance the ultimate aim of Title VII but rather "delay[s] resolution of the ultimate question whether the Act was violated" (*ibid.*). Such delay—occasioned by judicially imposed requirements regarding the content of commissioners' charges—is particularly unfortunate here, inasmuch as Section 706(b) expressly commits the form and content of all charges to the informed judgment of the Commission. 42 U.S.C. 2000e-5(b).

While the above considerations are by themselves sufficient to preclude judicial intervention at the pleading stage of administrative proceedings, there is yet another fundamental concern behind the Court's rejection in *Socal* of the position successfully advanced by the respondent below. Arguments going to the sufficiency of an agency's pleadings are hardly unique. "[E]very respondent to a Commission complaint could make the claim that [Shell] ha[s] made. Judicial review of the averments in the Commission's complaint should not be a means of turning prosecutor into defendant before adjudication concludes" (*Socal*, *supra*, 449 U.S. at 242-243). Were the rule

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[33] Even a finding of reasonable cause, made after an administrative investigation, is not final agency action reviewable in federal district court. A determination of reasonable cause merely requires the Commission to attempt to resolve the dispute by informal methods of conference, conciliation and persuasion—it does not fix any obligation or impose any duty on a respondent. *Georator Corp.* v. *EEOC*, 592 F.2d 765, 766 (4th Cir. 1979); *Francis-Sobel* v. *University of Maine*, 597 F.2d 15, 17 (1st Cir.), cert. denied, 444 U.S. 949 (1979).

otherwise, numerous administrative,[34] civil[35] and crimi-

[34] A great number of administrative agencies are authorized to act upon an administrative determination of "reasonable cause" or "reason to believe" a statutory violation exists. See, *e.g.*, 2 U.S.C. (Supp. V) 437g(a)(2) (Federal Election Commission); 7 U.S.C. 9 (Commodity Futures Trading Commission); 7 U.S.C. (Supp. V) 87f-2(b) and (c) (Federal Grain Inspection Service); 7 U.S.C. 193, 213, 228a, 292, 1599(a), 2046 (Secretary of Agriculture); 12 U.S.C. (Supp. V) 1730a(h)(5)(A) (Federal Savings & Loan Insurance Corp.); 12 U.S.C. (Supp. V) 1844(e)(1) (Board of Governors of the Federal Reserve System); 15 U.S.C. 21(b) (Interstate Commerce Commission, Federal Communications Commission, Civil Aeronautics Board, Federal Reserve Board and Federal Trade Commission); 15 U.S.C. (& Supp. V) 45, 57b-1(c)(1), 68e(b), 68h, 69g(b), 69i, 70f, 70i (Federal Trade Commission); 15 U.S.C. 77j(b), 80a-26(d) (Securities and Exchange Commission); 15 U.S.C. 1195(a) (Consumer Product Safety Commission); 15 U.S.C. 522 (Secretary of Commerce); 15 U.S.C. (Supp. V) 1312(a) (Attorney General); 20 U.S.C. (Supp. V) 1234(a) (Commissioner of Education); 29 U.S.C. (Supp. V) 816(b) (Secretary of Labor); 30 U.S.C. 185(r)(5) (Secretary of the Interior); 33 U.S.C. 1908(e), 46 U.S.C. 86h(a) (Secretary of the department in which the Coast Guard is operating); 38 U.S.C. (Supp. V) 1673(d) (Administrator of Veterans' Affairs); 42 U.S.C. 3142(b)(1) (Secretary of Commerce); 42 U.S.C. (& Supp. IV) 2000a-5, 3613, 3766(c)(3), 3789d(c)(3) (Attorney General); 49 U.S.C. (Supp. V) 10934(c)(1) (Interstate Commerce Commission); 7 U.S.C. 2305(b) (Secretary of Agriculture); 29 U.S.C. 160(1) (National Labor Relations Board); 46 U.S.C. 88f (collector of customs or Coast Guard District Commander). Cf. 2 U.S.C. (Supp. V) 501(e) (House Committee on Congressional Mailing Standards) ("substantial reason to believe"); 2 U.S.C. 502(b) (Senate Select Committee on Standards and Conduct of the Senate) (same); 8 U.S.C. 1182(a)(27) (consular officer or Attorney General) ("knows or has reason to believe"); 15 U.S.C. (& Supp. V) 77 (President) ("reasonable ground to believe"); 15 U.S.C. 77t(b), 78u(d) (Securities and Exchange Commission) ("appears to the Commission"). See generally 12 U.S.C. (Supp. V) 1464(d)(2)(A) (Federal Home Loan Bank Board) ("reasonable cause to believe" future violation is about to take place); 12 U.S.C. (Supp. V) 1730(e)(1) (Federal Savings and Loan Insurance Corporation) (same); 12 U.S.C. (Supp. V) 1786(e)(1) (National Credit Union Administration Board) (same); 12 U.S.C. (Supp. V) 1818(b)(1) (Federal Deposit Insurance Corporation) (same); 46 U.S.C. 834 (Secretary of the Treasury) ("satisfactory reason to believe"); 49 U.S.C. 41(3) (Attorney General) ("reasonable grounds to believe").

[35] See, *e.g.*, Fed. R. Civ. P. 11 (signing of pleading by attorney certifying that there is "good ground to support it").

nal [36] proceedings would be delayed while the courts went behind facially valid complaints to determine whether the charging authority actually possessed a sufficient factual basis to initiate a proceeding. Such review could soon bring the regulatory and judicial functions of the government to a complete standstill.[37]

The intensely practical considerations justifying the conclusion of the Court in *Socal* are amply illustrated by the course of events in this case, and mandate reversal of the court of appeals. By relying on its own "bottom line statistics" (J.A. 93) and claiming that the "statistical data now in the Commission's possession [do not] provide a basis for finding reasonable cause" (*id.* at 157), respondent has nullified for more than three years the Commission's investigation into the merits of Commissioner Norton's charge. Based on its assertion that the Commission has not yet established the necessary facts to bring a civil enforcement action, respondent has prevented the Commission from determining whether there are indeed reasonable grounds for considering such a course of action. These arguments go far beyond Section 706(b)'s requirement that the Commission provide respondents with notice of pending administrative charges; these arguments unavoidably trench on substantive concerns. A subpoena

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[36] See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (same).

[37] The Ninth Circuit refused to impose a factual pleading requirement on the Commission precisely because of the litigation such a rule would stimulate. The court noted that requiring the Commission to supply the basis for a charge "would inevitably encourage employers to challenge subpoenas on the ground that the EEOC could have supplied more information than was actually contained in the charge" (*EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1339).

enforcement proceeding, however, should not become a full fledged trial on the merits of an administrative charge.[38]

The decision below would supply every respondent to a commissioner's charge with immediate access to judicial review on the ground that the Commission has not provided a sufficient "factual basis" for the charge. Should the Commission be required to defend such actions in federal court as a matter of course, as well as submit to the depositions, interrogatories and other discovery sought by respondent (Resp. Br. In Opp. 5, 9, 19), the "integrated, multistep enforcement procedure" (*Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 359) designed by Congress in Title VII would simply break down.[39] The decision below erroneously and all too readily "enable[s] those subject to administrative authority unduly to delay investigations into their affairs." B. Schwartz, *Administrative Law* § 45, at 115 (1976).

Title VII of the Civil Rights Act of 1964 does not impose strict, technical pleading requirements upon complainants, whether they be private parties or the commis-

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[38] The record in this case demonstrates the fragile nature of the "notice" veil with which respondent has attempted to cloak its arguments. Although respondent argues that concepts of "fair notice" (Resp. Br. In Opp. 15) require the Commission to disclose the factual basis for a Section 706(b) charge, the record in this case discloses that, from the outset of this litigation, respondent has been repeatedly informed that Commissioner Norton's charge was formulated in accordance with "the published standards for the selection of systemic respondents" (J.A. 94). These standards provide that a systemic charge is based on "an analysis of EEO reporting data" (Pet. App. 41a-42a), and respondent has acknowledged that "much" of the statistical data upon which the present charge is based was "provided by the respondent" (J.A. 157; see also *id.* at 92). Therefore, respondent's assertion that it lacks "notice" of the factual basis for the present charge, while artful, is hardly persuasive.

[39] *Cf. EEOC* v. *K-Mart Corp.*, *supra*, 694 F.2d at 1067 (judicially ordered discovery into the factual basis of a Section 706(b) charge is "inconsistent with the enforcement scheme of Title VII").

sioners of the EEOC. A charge under Section 706(b) "is merely the first step in the administrative process, and it would defeat the Congressional scheme to impose detailed fact pleading burdens on the EEOC before it has had an opportunity to investigate the basis for the charge." *EEOC* v. *Dean Witter Co.*, *supra*, 643 F.2d at 1338.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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